No. 80-1436

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MALCOLM BALDRIGE, Secretary of Commerce, and DANIEL B. LEVINE, Acting Director, Bureau of the Census,

Petitioners,

v.

PETER SHAPIRO, Essex County Executive,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Counter-Statement of Question Presented

Whether a list of street numbers in the possession of the Census Bureau is exempt from disclosure under the Freedom of Information Act, 5 USC 552.

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Opinions Below

The order of judgment of the court of appeals (Petitioners' App. A, 1a-2a) is not reported. The oral opinion of the district court (Petitioners' App. D, 6a-13a) is not reported.

Counter-Statement of the Case

The County's goal in this litigation is to compare the Census Bureau's list of street numbers for Essex County with the County's own comprehensive record of street numbers, in order to identify deficiencies in the Bureau's data. To achieve that end, the County repeatedly offered to make its computerized address data available to the Census Bureau. (C.A.App. 41, 55). When those offers were rebuffed, and when the Bureau refused to make its address data available to the County, the respondent, Peter Shapiro, County Executive of Essex County, filed suit under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, to compel disclosure.

The respondent seeks access only to a list of street numbers for the county. Respondent does not ask for names of householders, the number of persons at an address, the number of housing units at an address, vacancy status, the use to which the property is put, or any other information. Because respondent seeks only a list of street numbers, and because the petitioners have not demonstrated that the disclosure of street numbers will result in the disclosure of any other information, only the confidentiality of a list of street numbers is at issue.*

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* The burden of proving that portions of a record are not "reasonably segregable", 5 USC 552(b), rests with the agency opposing disclosure—here, the petitioners. 5 USC 552(a) (4) (B); *Mead Data Cent. Inc.* v. *U.S. Department of Air Force*, 556 F2d 242, 259-262 (D.C. Cir. 1977).

The district court found that the petitioners did not demonstrate non-segregability, Petitioners' Appendix at 14a-15a; and the petitioners did not raise the issue in the court of appeals. Hence, the comments at page 10 of the Petition regarding the contents of the Bureau's master address register are irrelevant. The comments in footnote 6 of the Petition purporting to describe the work required to segregate address data are not founded on the record.

The district court flatly rejected the petitioners' claim of confidentiality. The record before the court demonstrated unequivocally that a list of street numbers would not provide any information about any particular individual or entity and that disclosure of such a list would not be a breach of confidentiality. Title 13, the district court held, does "not provide a blanket of confidentiality for any and all census materials; instead, the confidentiality requirement is structured solely to require that census material be used in furtherance of the Bureau's statistical mission and to ensure against disclosure of any particular individual's response. * * * Plaintiff (respondent) does not seek access to individual reports nor does he seek access to any information that would identify the data furnished in a particular report by a particular individual". Petitioners' Appendix at 9a-10a.

The district court therefore ordered that the Bureau grant respondent access to its street number data. The court required further that the Bureau delete all other information from the relevant documents, that respondent and his agents be sworn to confidentiality pursuant to 13 USC 23(c), and that any information developed by respondent as a result of access be considered by the Bureau as though it had been timely submitted through the Local Review Program. Petitioners' Appendix at 16a-17a, 18a-19a.*

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* The Census Bureau's Local Review Program is designed to improve the statistical accuracy of the census by allowing local government participation in the counting process. Despite the Bureau's refusal to disclose its street number data, and contrary to the repeated assertions of the petitioners in their petition to this Court, the County submitted extensive data to the Bureau in connection with the Local Review Program. The County's

(Footnote continued on following page)

On appeal, the court of appeals, after argument, summarily affirmed the final judgment of the district court. Petitioners' Appendix at 1a-2a.

Reasons for Denying the Writ

This case presents the question whether the FOIA may be invoked to compel the disclosure of a list of street numbers in the possession of the Census Bureau. The courts below found that disclosure would not reveal any information about any particular individual. They found further that disclosure would promote the public good by ensuring a higher degree of accuracy for the Bureau's population estimate for Essex County. Petitioners' Appendix at 12a. They concluded that there would be no breach of the confidentiality mandated by the census laws.

Because the disclosure order at issue is consonant with the law and serves the public good, there is no reason for review of this matter by the Court. Because the district court required that respondent and his agents be sworn to confidentiality pursuant to the census laws, the question of "disclsoure" to respondent is academic. Because the decision in *Seymour* v. *Barabba,* 559 F.2d 806 (D.C. Cir. 1977), involved the disclosure of substantive information about particular establishments, it has no bearing on the instant litigation and creates no decisional conflict re-

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(Footnote continued from preceding page)

efforts, together with the efforts of municipalities located in the County, contributed to an increase of nearly 30,000 in the Bureau's population estimate for Essex County. Still at issue are another approximately 30,000 residents who, respondent says, were missed by the Census Bureau. The Bureau's present estimate of the County's population is 850,451.

quiring resolution by this Court. And finally, because this case arises under the FOIA, its resolution will have only limited significance for the 1980 census season's yield of litigation. *City of Philadelphia* v. *Baldridge*, No. 80-2785 (3d Cir); *Holland* v. *Baldridge*, No. 80-73302 (E.D.Mich); *State of New Mexico* v. *Baldridge*, No. 80-0726-C (D.N.M.); *County of Dona Ana* v. *Baldridge*, No. 80-676 (D.N.M.); *City of Hobbs* v. *Klutznick*, No. 80-792-J.B. (D.N.M. November 17, 1980); *McNichols* v. *Klutznick*, No. 80-C-1151 (D. Colo. September 17, 1980), appeal pending No. 80-2033 (10th Cir); *Carey* v. *Klutznick*, No. 80 Civ. 4550 (S.D.N.Y. December 29, 1980), appeal pending No. 81-6042 (2d Cir). To the extent that these cases raise questions of confidentiality, they do so, counsel understands, not in the context of an FOIA request but, rather, in the course of challenges to the specific population estimates adopted by the Bureau and, for that reason, implicate a different body of law.

1. No provision of the Census Act prohibits disclosure of data like a list of street numbers. Section 8(b) of the Act, 13 U.S.C. 8(b), prohibits only the disclosure of "information reported by, or on behalf of, any particular respondent". Section 9(a), 13 U.S.C. 9(a), similarly prohibits only "publication whereby the data furnished by any particular establishment or individual under this title can be identified". 13 U.S.C. 9(a)(2). The obvious theme here is to prohibit disclosure only of data that can be identified with particular individuals and establishments.

A list of street numbers does not reveal any information about any particular individual. As the petitioner fully acknowledged below, such a list does not identify the source of a particular address, the identity of the occupants, the number of occupants, whether there are any occupants, or even whether there is a building to be occu-

pied. C.A. App. 36. Instead, a list of street numbers is simply a list of the numbers that have been assigned, by developers or by local government, to buildings and vacant lots situated along the streets within the jurisdiction of a local government. They are indistinguishable, in terms of confidentiality, from a bare list of block and lot numbers.

The petitioners suggest that disclosure of a list of street numbers would violate Sections 8(b) and 9(a) because many addresses are gathered by the Bureau "as the result of responses by indivdiuals to census inquiries." Petition at 10. Similarly, at 15-16, they suggest that the confidentiality mandate extends to any information reported by or on behalf of any respondent. If this were the touchstone for decisions under the confidentiality provisions of the census laws, then the petitioners would be forbidden to disclose essentially all the data they now publish with alacrity. The statutory test is not how the information is gathered, but what it reveals; and both statutory sections, as indicated above, condemn only those disclosures that reveal information about particular individuals.

The petitioners also suggest that disclosure of street numbers will reveal the illegal "occupancy of abandoned dwellings or the residential use of lofts zoned only for commercial purposes". Petition at 10. This contention is contrary to the petitioners' own proofs. C.A. App. 36a.* The record, as noted above, is unequivocal on this score—that a list of street numbers provides no substantive data about the use, occupancy, or existence of a structure at a particular address.

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* The referenced document makes clear that, although information with respect to use and occupancy is contained in the Bureau's records, a bare list of street numbers extracted from the Bureau's data would not, even indirectly, disclose such information.

The history of the census laws further strengthens the view, supported by common sense as well, that the provision for confidentiality is designed only to preclude the release of data that can be identified with particular individuals. As indicated above, the language of both Sections 8(b) and 9(a) focuses expressly on this concern. The predecessor to the present Section 9(a) was similarly directed against disclosures "whereby the data furnished by any particular establishment can be identified . . .". Act of July 2, 1909, ch. 2, Section 25, 36 Stat. 9. The thought is echoed in the congressional reports on the Privacy Act of 197 , 5 USC 552a (b) (4). The senate report explains that the dissemination to the Cenus Bureau of records regarding individuals is not prohibited by the Act because the Bureau's own mandate to preserve confidentiality precludes further dissemination. The report then proceeds to characterize the Bureau's mandate as "prohibit[ing] publication of data gathered by the Bureau in identifiable form . . .". S. Rep. No. 93-1183, 93rd Cong. 2d Sess. 70 (1974). Likewise, Congress' response to this Court's decision in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961), reflects a concern only with the disclosure of information about an identifiable individual or entity. The Court's decision there held that a copy of a census report retained by the reporting establishment was not immune from judicial process. The congressional reaction to the decision, putting such documents beyond the reach of process, demonstrates not an undifferentiated opposition to disclosure of Bureau data but, rather, opposition to the disclosure of data about particular individuals or establishments. Act of October 15, 1962, Pub. L. No. 87-813, 76 Stat. 922.

The judgment below does not require the disclosure of any information about any particular individual or entity and thus preserves the full measure of confidentiality required by Congress.

2. Neither *Seymour* v. *Barabba*, 559 F2d 806 (D.C. Cir. 1977), nor any decision of this Court suggests that disclosure of a list of street numbers is prohibited by the Census Act. The district court correctly held that *Seymour* v. *Barabba* has no bearing on the case at bar. Petitioners' Appendix at 11a. In *Seymour*, the plaintiff sought not a list of street numbers but names and addresses of particular companies and substantive information about their business activities. The disclosure request was, in other words, flatly interdicted by those sections of the Act which forbid the disclosure of "information reported by, or on behalf of, any particular respondent" (Section 8(b)) and "any publication whereby the data furnished by any particular establishment or individual under this title can be identified". (Section 9(a)).

There is, then, no decisional conflict requiring resolution by this Court.

3. The district court's order fully protects the government's asserted interest in preserving confidentiality and renders the question of disclosure academic. By requiring that respondent and his agents be sworn to secrecy pursuant to the Census Act, 13 U.S.C. 23(c), the court insured that respondent would get the relief he merited and the petitioners would obtain the confidentiality they sought. After being sworn, plaintiff and his agents will be indistinguishable from the tens of thousands of other Census Bureau employees with access to data. All will be subject to severe sanctions for a breach of confidentiality. Hence, even if there were something privileged about a mere list of street numbers, disclosure to the respondent pursuant to the terms of the district court's order poses no threat of public harm and creates no need for further judicial review.

4. Finally, a decision in this case will not dispose of the confidentiality issues raised by other census litigants. Because this case arises under the FOIA it will necessarily be resolved in a procedural and substantive context distinct from essentially all other pending cases, where the confidentiality issue is presented as part of a broader challenge to the Census Bureau's methodology and product. See *City of Philadelphia* v. *Baldridge*, No. 80-2785 (3d Cir); *Holland* v. *Baldridge*, No. 80-73302 (E.D. Mich); *State of New Mexico* v. *Baldridge*, No. 80-0726-C (D.N.M.); *County of Dona Ana* v. *Baldridge*, No. 80-676 (D.N.M.); *City of Hobbs* v. *Klutznick*, No. 80-792-J.B. (D.N.M. November 17, 1980); *McNichols* v. *Klutznick*, No. 80-C-1151 (D.Colo. September 17, 1980), appeal pending No. 80-2023 (10th Cir); *Carey* v. *Klutznick*, No. 80 Civ. 4550 (S.D.N.Y. December 29, 1980), appeal pending, No. 81-6042 (2d Cir).

Because the rules will be different in these other cases, because the case at bar does not provide the Court with an effective means for resolving the myriad issues raised by pending census litigation, and because the judgments of the district court and court of appeals are not reported and will thus have little precedential value, the Court is respectfully urged to deny the writ.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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